IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 79.

JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT (NORFOLK SOUTHERN RAILROAD),----------Petitioner.

v.

JOHN L. ROPER LUMBER COMPANY,---Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF FACTS

There is no dispute as to the facts in this case. Upon trial in the lower Court the case was submitted upon an agreed statement of facts (Record pp. 12-13).

On June 24th, 1918, John L. Roper Lumber Company delivered to James C. Davis, Director General of Railroads (Norfolk Southern Railroad), at New Bern, North Carolina, a carload of scrap iron, for transportation to Clarksburg, West Virginia. The shipment was made on what is known as an order notify bill of lading. By the terms of the bill of lading the shipment was consigned to the order of John L. Roper Lumber Company,

notify George Yampolsky. Upon arrival of the shipment at destination it was delivered to Yampolsky without requiring the surrender of the bill of lading.

John L. Roper Lumber Company did not file claim for the loss of the shipment until more than six months after delivery of the property.

The sole defense of petitioner was that claim was not filed within the time prescribed by the bill of lading.

PROVISIONS OF BILL OF LADING AND LAST PROVISO OF SECTION 20, ACT TO REGULATE COMMERCE.

The 3rd paragraph of Sec. 3 of the Bill of Lading contained the following provision:

> "Claims for loss, damage or delay must be made in writing to the carrier at the point of delivery or at the point of origin within six months after delivery of the property, or in case of failure to make a delivery then within six months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable."

Section 20 of the Interstate Commerce Act in force at the time this cause of action accrued contains the following provision:

> "Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

The provisions of Section 20 of the Act to Regulate Commerce, above quoted, must be read into the 3rd paragraph of Section 3 of the Bill of Lading.

It is the contention of the respondent that, under the above quoted provision of Section 20 of the Interstate Commerce Act, it was not necessary to file a claim, for the shipment was delivered without surrender of the original Order Notify Bill of Lading, which was a delivery by the carelessness and negligence of the carrier, and, therefore, a loss or damage in transit by carelessness or negligence.

It, therefore, appears that this case narrows itself to the construction of the above provision of Section 20 of the Interstate Commerce Act and particularly the words "damaged in transit by carelessness or negligence."

CONSTRUCTION OF LAST PROVISO OF SECTION 20 ACT TO REGULATE COMMERCE.

This Honorable Court has very recently had occasion to construe this proviso of Section 20 of the Interstate Commerce Act. Barrett v. Van Pelt, decided April 13, 1925, No. 160, October Term, 1924.

In the above mentioned case it was held to be proper to eliminate the final "d" in "damaged" and to omit the comma after "unloaded". By so doing it would make the clause read as follows:

> "Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded or damage in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

So it was said:

> "We hold that the second clause must be read as above indicated, that carelessness or negligence is an element in each case of loss, damage or injury included therein, and that, in such cases, carriers are not permitted to require notice of claim or filing of claim as a condition precedent to recovery. See Hailey v. Oregon Short Line R. Co., 253 Fed. 569."

The agreed statement of facts admits that the shipment was delivered without surrender of the bill of lading. This was negligence on the part of the carrier, for the duty of the carrier was to see that the shipment was not delivered without surrender of the bill of lading properly endorsed. See Sections 9 and 10 of Bills of Lading Act, 39 Stat. L. 538.

and brief for certiorari, admits that the element of carelessness and negligence exists in this case. But the petitioner attempts to justify the refusal to pay the claim on the ground that the shipment was not in transit, and that there was no actual physical damage to the shipment.

In view of what was said in the above mentioned case of Barrett v. Van Pelt, we do not think that either of those claims are tenable.

We do not deem it necessary to discuss this question at length. We do contend, however, that the case of Barrett v. Van Pelt (supra) fully sustains the judgment of the trial court.

THE SHIPMENT WAS IN TRANSIT

Petitioner discusses at some length that the case at bar is a non-delivery case and not a transit case. Reference is made to the case of Blish Milling Co. v. Railway, 241 U. S. 190, 195. We have no contentions to make as to what was decided in that case. However, the shipment involved therein moved in 1910 and therefore the Cummins Amendment had no application. We feel that we might go so far as to refer to a part of the quotation from the Blish Milling Co. case, found on page 22 of petitioner's brief:

> "But 'delivery' must mean delivery as required by the contract, and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning to cover all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed."

So, in the case at bar the misdelivery or failure to make delivery in accordance with the terms of the contract was a loss to the owner by the negligence of the carrier.

It is our opinion that the words "in transit" as used in the proviso mean while the goods are in the possession of the carrier as carrier.

Many cases could be cited upholding the doctrine that the right of stoppage in transit exists after arrival of the shipment at destination; where they are held in warehouse for default in payment of freight or so long as the shipment is not in the actual or constructive possession of the consignee.

It would indeed be a narrow construction or interpretation to hold that the goods are not "in transit" after arrival at destination. The carrier's liability as such, under the provisions of the Bill of Lading, does not change to that of warehouseman until forty-eight (48) hours after notice of arrival. The loss and damage herein complained of was due to the negligence of the carrier in delivering the shipment without surrender of the original order bill of lading. At that time the transportation had not been completed.

The words "in transit" as used by Congress come within the meaning of the word "transportation."

And by Section 1 of the Act to Regulate Commerce, Congress has defined the term "transportation," as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars and other vehicles, vessels and all instrumentalities and facilities of shipment or carriage irrespective of ownership or any contract, express or implied, for the use thereof and **all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported.**"

See also case of Cleveland, etc. Railroad v. Dettlebach, 239 U. S. 588, 60 L. Ed., 453; 36 Supreme Court Reporter, 177.

In the case of Erie R. R. Co. v. Shuart, 250 U. S., 465; 63 L. Ed. 1088, it was held that after the car had arrived at destination and the carrier had placed it on the switch track opposite a chute and left it in charge of the consignee for unloading, transportation of the shipment was still in progress. The Court in that case said:

> "The animals were in the car; no adequate time for unloading had transpired. The carrier had not fully performed the services incident to final delivery imposed by law. This included the furnishing of fair opportunity and proper facilities for safe unloading, although the shippers had contracted to do the work of actual removal."

The attention of the Court is further invited to the case of Michigan Central R. R. v. Mark Owen & Company, 41 Sup. Ct. Rep., 554; 65 L. Ed. 690. It was held in that case that the relation of a carrier to a shipment during the first 48 hours after a car has been placed on the public delivery track at destination and notice of arrival has been given to the consignee, is that of carrier or insurer. The Court holds that until the responsibility of warehouseman attached, that of carrier continued. The opinion of the Court in this case is very persuasive to show that a shipment is in transit so long as the carrier retains control over same, that is, from the time it issues a bill of lading for a shipment until it surrenders all possession and control to the ultimate consignee, or until its status has changed from carrier to warehouseman.

In the case of Brown v. Western Union Telegraph Company (S. C.) 67 S. E. 146, it is held that a telegraph message is in transit after it reaches its destination and is in the hands of the messenger boy.

What is the difference between the telegraph message in the hands of the telegraph boy and the shipment of freight in the hands of the railroad agent at destination?

In the case of Brown v. Western Union Telegraph Co. (supra) it was said:

> "A message is in transit, not only while it is being sent over the wires, but during the time it is in the hands of the messenger for delivery, after it reaches the place where the addressee resides; and there is no sound reason why the company should be liable when the agent in the State from which the message has been sent, or an agent along the line, is guilty of negligence, and yet not be liable for an act of negligence on the part of the messenger to whom the telegram is handed for delivery by the agent of the terminal office."

And why should the notice or filing of claim be dispensed with when there is a delay or damage while the shipment is actually moving over the rails, but required when the damage or loss is caused by the negligence of the agent at destination?

In other words, "in transit" as used in the proviso, means at any time after the property has been received by the initial carrier for interstate transportation and before the contract of carriage for the entire transportation is completely performed; and that the entire transportation includes delivery in accordance with the contract—which contract, of course, is assumed to be one which is valid under the statute.

Jennings etc. Co. v. Virginian Railway Co. (Va.), 119 S. E. 147.

See also opinion in this case by Supreme Court of Appeals of Virginia.

DOES THE PROVISO APPLY ONLY WHEN THERE IS ACTUAL PHYSICAL DAMAGE?

Petitioner takes the position that the proviso is only applicable when there is actual physical damage to the

shipment. This would, indeed, be a narrow construction of the statute. The contention is overruled by the decision in the case of Barrett v. Van Pelt, supra, wherein it was held that the carrier was liable for a decline in the market, when the shipment was delayed by the negligence of the carrier, and under such circumstances it was not necessary to file a claim.

See also New York etc. R. Co. v. Peninsula Produce Exchange, 240 U. S. 34, 60 L. Ed. 511.

In that case the court said that two questions were involved, the first of which was:

> "1. Does the Carmack Amendment (34 Stat. at L. 593, chap. 3591, Comp. Stat. 191338592) impose on the 'initial carrier' liability for delay occurring on the line of its connection without actual physical damage to the property?"

It was held that the carrier was liable for a loss on account of a decline in the market, the shipment having been delayed in transportation, although there was no physical damage to the shipment.

Compare Norfolk Truckers Exchange v. Norfolk Southern Railroad Company 116 Va. 466.

The proviso under construction is a part of Section 20 of the Interstate Commerce Act. We see no good reason why the words "loss, damage or injury" should be construed in one part of the section not to mean actual physical damage and in another part of the section to mean actual physical damage.

THE CASE AT BAR COMES WITHIN THE PROVISO AND NO NOTICE OR FILING OF CLAIM WAS NECESSARY.

We earnestly submit that, in this case there was a loss occurring in transit by the carelessness or negligence of the carrier.

There is no dispute as to the loss or damage to the shipment and the negligence is admitted. This would seem to be sufficient to sustain the judgment for the plaintiff.

We think that the case of Van Pelt v. (supra) governs the case at bar.

There have been several cases decided by the Courts directly in point with this case.

The case of Gillette Razor Co. v. Davis 278 Fed. 864 expressly holds that notice is not required when the loss or damage is caused by the carelessness or negligence of the carrier. In that case the shipment had arrived at destination and after it had been loaded on trucks it was stolen. The Court held that there was a loss or damage in transit, but as the theft was not due to negligence of the carrier, notice of claims was required. Here the negligence is admitted.

The case of Hailey, et al. v. Oregon Short Line R. R., 253 Federal, 569, holds that where an interstate shipment of horses was unnecessarily and carelessly held on the railroad yards at an intermediate point, notice of claim for loss was unnecessary. The Court in that case held that while the shipment was held in the railroad yards at an intermediate point, the shipment was in transit, and said:

> "If then, we take the only course open to us and give to the terms employed their com-

mon import, what is the result? To say that the phrase "in transit" is applicable only while a shipment is actually moving is to give to it an unusual and strained construction. Ordinarily a shipment is understood to be in transit from the point of origin until it reaches the point of destination. So long as it is in the course of being delivered to the place to which it is being shipped, it is in transit. A piece of baggage billed from New York to Boise is in transit all the time it is in the possession of the carrier for delivery at Boise—just as much as when it is upon a car standing at a station, pursuant to or awaiting orders, or upon a truck or station platform for transfer to another car, en route, as when it is upon a car moving 40 miles an hour. Not only would we do violence to the ordinary meaning of the phrase if we held that here it is to be understood as equivalent to 'while actually moving,' but such a construction would necessarily result in absurd distinctions. As to the duty of giving notice or filing a claim, why should a discrimination be made between the case of a collision, where the car carrying the shipment is standing on a siding, and one where it is moving on a siding? Nor, if we say 'in transit' is limited to cases where the shipment is actually in a car, is the construction any more defensible. No semblance of reason can be assigned for requiring notice if the freight is burned or stolen from a car, and at the same time relieving the shipper from such obligation if the theft or fire was in an adjacent freight depot. True, the phrase may sometimes be used in a narrow sense; but there is nothing here in the attendant language to suggest the exceptional use, and, to say the least, such a use would contribute nothing to the reasonableness of the

provision as a whole. The phrase is therefore to be understood in the sense in which it is commonly employed."

The case of Morrell v. Northern Pacific Ry. Co. (N. D.) 179, N. W. 922, is directly in point. In that case it was held that the provision in the shipping contract, requiring the shipper, as a condition precedent to the right to recover damages for delay in transit or for loss or injury to the shipment of stock, to give notice in writing of his claim within ninety days after delivery at destination, was not applicable in view of Section 8640-a Compiled Statutes United States.

In passing upon the question, on all fours with the one herein, the Court said:

> "The stipulation before us requires the giving of notice of claim within ninety days, after delivery of such stock at destination. From the facts established beyond a dispute it appears that the stock covered by the contract was never delivered at destination and that the recovery is based upon its non-delivery. The purpose of such a provision is doubtless to enable the carrier to investigate claims while this evidence is fresh, and thus to afford a means of protection against fraudulent and exaggerated claims. That it was not intended to shield carriers from liability occasioned by their negligence may well be inferred from the provisions of Section 8604-a Compiled Statutes U. S., 1918, which recognizes not only the right of carriers to require 90 days' notice of claims, but which further provides that—
>
> " 'If the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor

filing of claim shall be required as a condition precedent to recovery.'

"In the instant case it appears prima facie that the loss of the cattle was due to negligence, and it would therefore seem to be a case controlled by the proviso above quoted, wherein the carrier is prohibited from requiring notice as a condition precedent to recovery."

And further the Court said:

"For these reasons we are of the opinion that compliance with the stipulations requiring notice was not a condition precedent to the plaintiff's right of recovery."

The case of Morrell v. Northern Pacific Ry. Co. (supra) was a case of non-delivery, or failure to deliver, and as said by the defendant in his petition, Record page 7, "the wrongful delivery comes within the bill of lading category of failure to make delivery." In the case of a failure to make delivery, the loss or damage would be in transit. Therefore, to use the defendant's own words, the wrongful delivery being a failure to make delivery was loss of or damage to the shipment in transit.

The Supreme Court of North Carolina in the case of Mann v. Fairfield & E. C. Transportation Co., 96 S. E., 731, after quoting the proviso said:

"The verdict having established that the loss and damage complained of in the present instance was caused by the negligence of the connecting carrier, the plaintiff's claim comes clearly within the express terms of the statute, and the defendant is thereby deprived of any defense, which might arise from failure of plaintiff to give notice."

In the case of Scott v. American Railway Express Company 189 N. C., 377, a shipment of shoes was made from Milwaukee, Wis., to plaintiffs at Rose Hill, N. C. The shoes were never delivered to plaintiff. The claim was not filed within four months after a reasonable time for delivery had elapsed. The Court held that as there was a loss in transit by the carelessness of the carrier the plaintiff was excused from filing a claim.

In that case it was said:

> "It is suggested that there may be a valid reason for requiring notice of claim to be filed in case of total loss which does not exist in case of damage in transit by carelessness or negligence, in that the carrier has notice of the damaged condition of the goods while in its possession and at the time of delivery and might not have such notice of a total loss of a shipment in transit. This argument would seem to be without special merit, because it is a matter of common knowledge that all carriers, issuing bills of lading and express receipts, keep records of shipments made over their lines; and from such records, information of non-delivery is just as easily had as notice of negligent injury or damage in transit. There can be no difference in principle, as regards the duty to exercise diligence between the loss in transit by some negligent act of the carrier, resulting in the partial or total loss of said shipment."

Compare Winstead v. East Carolina R. Co. 186 N. C. 58; 118 S. E. 887.

LIABILITY OF CARRIER UNDER BILLS OF LADING ACT.

We are convinced that the judgment of the lower court must be affirmed on the authority of Barrett v.

Van Pelt supra. However, we consider the respondent's position strengthened by the terms of the Bills of Lading Act.

Attention is invited to the notice of motion and agreed statement of facts. The cause of action is laid for carelessly and negligently delivering the shipment without surrender of the bill of lading; and for the failure and refusal of the defendant to deliver the shipment to John L. Roper Lumber Company, the lawful holder of the bill of lading.

The Bills of Lading Act of Congress was approved August 29, 1916, being "An Act Relating to Bills of Lading in Interstate and Foreign Commerce," 39 Stat. L. 538. Section 7 thereof makes order bills of lading negotiable. Section 10 provides:

> "That where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to any one having a right of property or possession in the goods if he delivered them otherwise than as authorized by subdivision (b) and (c) of the preceding section * * *"

The preceding Section 9 provides that the carrier is justified in delivering the goods, subject to Sections 10, 11 and 12, to one who is:

> "(a) A person lawfully entitled to the possession of the goods, or
>
> (b) The consignee named in a straight bill for the goods, or
>
> (c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

The plaintiff, therefore, earnestly contends that as it is the lawful holder of the order bill of lading; that it is in possession of said order bill of lading, by the terms of which the goods are deliverable to its order; that the defendant delivered said shipment to one who was not lawfully entitled to the same; that the defendant is liable to plaintiff for the full value of the shipment under Section 10 of the Bills of Lading Act of Congress, and under such circumstances it was not necessary to file a claim.

THE JUDGMENT SHOULD BE AFFIRMED.

It is respectfully submitted:

(1). The plaintiff alleged negligence, and under the agreed statement of facts it was admitted that the shipment in question was delivered by the negligence of the carrier's agent, therefore, it was not necessary for the claim to be filed. The distinction as made by Congress was between the liabilities resulting from the carrier's negligence and those which rest upon a different basis, and, accordingly, Congress provided that a carrier could not require notice of claim for damages arising out of its own negligence.

(2). That as the shipment was wrongfully delivered without surrender of the original order bill of lading, and as the plaintiff is the lawful holder of said bill of lading, the liability of the defendant is absolute under the terms of the Bills of Lading Act of Congress.

Respectfully submitted,

CLAUDE M. BAIN,
Attorney for John L. Roper Lumber Company.